

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MARCUS A. MOORE,

Plaintiff,

V.

CAROLYN W. COLVIN, Commissioner of
Social Security,¹

Defendant.

Case No. 3:12-cv-05767-KLS

ORDER AFFIRMING DEFENDANT'S DECISION TO DENY BENEFITS

Plaintiff has brought this matter for judicial review of defendant's denial of his

application for supplemental security income (“SSI”) benefits. Pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73 and Local Rule MJR 13, the parties have consented to have this matter heard by the undersigned Magistrate Judge. After reviewing the parties’ briefs and the remaining record, the Court hereby finds that for the reasons set forth below defendant’s decision to deny benefits should be affirmed.

FACTUAL AND PROCEDURAL HISTORY

On January 16, 2007, plaintiff filed an application for SSI benefits, alleging disability as of February 10, 2003, due to depression, asthma, lung problems, and chemical dependency. See Administrative Record (“AR”) 23, 204. That application was denied upon initial administrative review on April 25, 2008, and on reconsideration on October 9, 2008. See AR 23. A hearing

¹ On February 14, 2013, Carolyn W. Colvin became the Acting Commissioner of the Social Security Administration. Therefore, under Federal Rule of Civil Procedure 25(d)(1), Carolyn W. Colvin is substituted for Commissioner Michael J. Astrue as the Defendant in this suit. **The Clerk of Court is directed to update the docket accordingly.**

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1 was held before an administrative law judge (“ALJ”) on April 14, 2010, at which plaintiff,
2 represented by counsel, appeared and testified, as did a vocational expert. See AR 45-81.

3 In a decision dated May 24, 2010, the ALJ determined plaintiff to be not disabled. See
4 AR 23-36. Plaintiff’s request for review of the ALJ’s decision was denied by the Appeals
5 Council on July 13, 2012, making the ALJ’s decision the final decision of the Commissioner of
6 Social Security (the “Commissioner”). See AR 1; see also 20 C.F.R. § 416.1481. On September
7 6, 2012, plaintiff filed a complaint in this Court seeking judicial review of the Commissioner’s
8 final decision. See ECF #4. The administrative record was filed with the Court on November 16,
9 2012. See ECF #11. The parties have completed their briefing, and thus this matter is now ripe
10 for the Court’s review.

12 Plaintiff argues the Commissioner’s final decision should be reversed and remanded for
13 an award of benefits, because the ALJ erred in evaluating the medical opinion evidence from
14 Bruce A. Eather, Ph.D., John Arnold, Ph.D., and Scot N. Gibson, Ph.D. For the reasons set forth
15 below, however, the Court disagrees that the ALJ so erred, and therefore finds that defendant’s
16 decision to deny benefits should be affirmed.

18 DISCUSSION

19 The determination of the Commissioner that a claimant is not disabled must be upheld by
20 the Court, if the “proper legal standards” have been applied by the Commissioner, and the
21 “substantial evidence in the record as a whole supports” that determination. Hoffman v. Heckler,
22 785 F.2d 1423, 1425 (9th Cir. 1986); see also Batson v. Commissioner of Social Security
23 Admin., 359 F.3d 1190, 1193 (9th Cir. 2004); Carr v. Sullivan, 772 F.Supp. 522, 525 (E.D.
24 Wash. 1991) (“A decision supported by substantial evidence will, nevertheless, be set aside if the
25 proper legal standards were not applied in weighing the evidence and making the decision.”)

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1 (citing Brawner v. Secretary of Health and Human Services, 839 F.2d 432, 433 (9th Cir. 1987)).

2 Substantial evidence is “such relevant evidence as a reasonable mind might accept as
 3 adequate to support a conclusion.” Richardson v. Perales, 402 U.S. 389, 401 (1971) (citation
 4 omitted); see also Batson, 359 F.3d at 1193 (“[T]he Commissioner’s findings are upheld if
 5 supported by inferences reasonably drawn from the record.”). “The substantial evidence test
 6 requires that the reviewing court determine” whether the Commissioner’s decision is “supported
 7 by more than a scintilla of evidence, although less than a preponderance of the evidence is
 8 required.” Sorenson v. Weinberger, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975). “If the evidence
 9 admits of more than one rational interpretation,” the Commissioner’s decision must be upheld.
 10 Allen v. Heckler, 749 F.2d 577, 579 (9th Cir. 1984) (“Where there is conflicting evidence
 11 sufficient to support either outcome, we must affirm the decision actually made.”) (quoting
 12 Rhinehart v. Finch, 438 F.2d 920, 921 (9th Cir. 1971)).²

13
 14 The ALJ is responsible for determining credibility and resolving ambiguities and
 15 conflicts in the medical evidence. See Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998).
 16 Where the medical evidence in the record is not conclusive, “questions of credibility and
 17 resolution of conflicts” are solely the functions of the ALJ. Sample v. Schweiker, 694 F.2d 639,
 18 642 (9th Cir. 1982). In such cases, “the ALJ’s conclusion must be upheld.” Morgan v.
 19 Commissioner of the Social Sec. Admin., 169 F.3d 595, 601 (9th Cir. 1999). Determining
 20
 21

22² As the Ninth Circuit has further explained:

23 . . . It is immaterial that the evidence in a case would permit a different conclusion than that
 24 which the [Commissioner] reached. If the [Commissioner]’s findings are supported by
 25 substantial evidence, the courts are required to accept them. It is the function of the
 26 [Commissioner], and not the court’s to resolve conflicts in the evidence. While the court may
 not try the case de novo, neither may it abdicate its traditional function of review. It must
 scrutinize the record as a whole to determine whether the [Commissioner]’s conclusions are
 rational. If they are . . . they must be upheld.

Sorenson, 514 F.2dat 1119 n.10.

1 whether inconsistencies in the medical evidence “are material (or are in fact inconsistencies at
 2 all) and whether certain factors are relevant to discount” the opinions of medical experts “falls
 3 within this responsibility.” Id. at 603.

4 In resolving questions of credibility and conflicts in the evidence, an ALJ’s findings
 5 “must be supported by specific, cogent reasons.” Reddick, 157 F.3d at 725. The ALJ can do this
 6 “by setting out a detailed and thorough summary of the facts and conflicting clinical evidence,
 7 stating his interpretation thereof, and making findings.” Id. The ALJ also may draw inferences
 8 “logically flowing from the evidence.” Sample, 694 F.2d at 642. Further, the Court itself may
 9 draw “specific and legitimate inferences from the ALJ’s opinion.” Magallanes v. Bowen, 881
 10 F.2d 747, 755, (9th Cir. 1989).

12 The ALJ must provide “clear and convincing” reasons for rejecting the uncontradicted
 13 opinion of either a treating or examining physician. Lester v. Chater, 81 F.3d 821, 830 (9th Cir.
 14 1996). Even when a treating or examining physician’s opinion is contradicted, that opinion “can
 15 only be rejected for specific and legitimate reasons that are supported by substantial evidence in
 16 the record.” Id. at 830-31. However, the ALJ “need not discuss *all* evidence presented” to him
 17 or her. Vincent on Behalf of Vincent v. Heckler, 739 F.3d 1393, 1394-95 (9th Cir. 1984)
 18 (citation omitted) (emphasis in original). The ALJ must only explain why “significant probative
 19 evidence has been rejected.” Id.; see also Cotter v. Harris, 642 F.2d 700, 706-07 (3rd Cir. 1981);
 20 Garfield v. Schweiker, 732 F.2d 605, 610 (7th Cir. 1984).

22 In general, more weight is given to a treating physician’s opinion than to the opinions of
 23 those who do not treat the claimant. See Lester, 81 F.3d at 830. On the other hand, an ALJ need
 24 not accept the opinion of a treating physician, “if that opinion is brief, conclusory, and
 25 inadequately supported by clinical findings” or “by the record as a whole.” Batson v.

1 Commissioner of Social Sec. Admin., 359 F.3d 1190, 1195 (9th Cir. 2004); see also Thomas v.
 2 Barnhart, 278 F.3d 947, 957 (9th Cir. 2002); Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir.
 3 2001). An examining physician's opinion is "entitled to greater weight than the opinion of a
 4 nonexamining physician." Lester, 81 F.3d at 830-31. A non-examining physician's opinion may
 5 constitute substantial evidence if "it is consistent with other independent evidence in the record."
 6 Id. at 830-31; Tonapetyan, 242 F.3d at 1149.
 7

8 As noted above, plaintiff takes issue with the ALJ's evaluation of the medical opinion
 9 evidence from evaluating psychologist Dr. Eather. In regard to that evidence, the ALJ found:

10 The record contains several [state agency] psychological assessments from
 11 consulting psychologist Bruce Eather[,] Ph.D. In November of 2005, he
 12 opined no to moderate cognitive limitations and no to marked social
 13 limitations ([record exhibit] 20F30). In May of 2006, he opined no to marked
 14 cognitive limitations and mild to marked social limitations (20F21). In
 15 December of 2006, he opined mild to marked cognitive limitations and mild
 16 to marked social limitations (20F12). In February of 2008, he opined no to
 17 marked cognitive limitations and mild to marked social limitations (20F3).
 18 Finally, in February 2009, he opined no to marked cognitive limitations and
 19 mild to marked social limitations (32F4). All of these assessments were based
 20 on the claimant's report that his substance dependence was in early full
 21 remission or sustained full remission when, as noted above, the record
 22 documents no clear period of sobriety. At [the] hearing the claimant testified
 23 that he last used substances in September of 2009. Dr. Eather's conclusions
 24 also are inconsistent with the medical record as a whole, which shows
 25 relatively intact daily activities. For these reasons, the undersigned gives Dr.
 26 Eather's opinions little weight.

20 AR 33. Plaintiff argues the ALJ's statement that Dr' Eather's conclusions are "inconsistent with
 21 the medical record as a whole" is insufficiently specific. The undersigned agrees as the ALJ did
 22 not give any indication as to exactly what in the medical record she considered here. See Embrey
 23 v. Bowen, 849 F.2d 418, 421-22 (9th Cir. 1988).³ While the ALJ's decision does contain a fairly
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25
 26 ³ As the Ninth Circuit explained:

To say that medical opinions are not supported by sufficient objective findings or are contrary
 to the preponderant conclusions mandated by the objective findings does not achieve the level

1 detailed summary of the medical evidence in the record, that summary itself makes clear that the
2 record is not uniformly consistent concerning the nature and severity of plaintiff's symptoms and
3 limitations, and the ALJ does not state which portion or portions thereof she relied to reject Dr.
4 Eather's conclusions. See AR 28-34. Without such a discussion, the Court cannot determine if
5 the ALJ properly weighed that evidence in finding as she did.

6 The Court also agrees with plaintiff that the ALJ erred in discounting the conclusions of
7 Dr. Eather based on her "relatively intact activities." The ALJ properly may reject the opinion of
8 a medical source if that opinion conflicts with evidence in the record of the claimant's activities.
9 See Morgan, 169 F.3d at 601-02 (upholding ALJ's rejection of physician's conclusion that
10 claimant suffered from marked limitations in part on basis that claimant's reported activities of
11 daily living contradicted that conclusion). First, again as noted by plaintiff, the ALJ did not state
12 what specific activities she relied on to reject Dr. Eather's conclusions. In addition, the evidence
13 in the record does not necessarily show plaintiff has engaged in activities in a manner or to an
14 extent indicative of an ability to function at a level greater than that found by Dr. Eather, at least
15 from a mental standpoint. See AR 55-56, 70-74, 211-15, 218, 228-33, 276-81, 293-98, 308, 319,
16 323, 404, 461, 538, 575.

17 That being said, the Court finds the ALJ properly discounted Dr. Eather's conclusions for
18 the reason that while they "were based on [plaintiff's] report that his substance dependence was
19 in early full remission or sustained full remission when . . . the record documents no clear period
20 of sobriety." AR 33. As the ALJ noted earlier in her decision, plaintiff has not been consistent in
21 reporting his substance abuse:

22 of specificity our prior cases have required, even when the objective factors are listed
23 seriatim. The ALJ must do more than offer his conclusions. He must set forth his own
24 interpretations and explain why they, rather than the doctors', are correct. . . .

25
26 Id.

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1 . . . At consultative psychological examination in September of 2007, he
 2 reported that he had been clean of all drugs for 3 years (12F3); however, at
 3 mental health treatment intake in August of 2007, he reported that he had used
 4 cocaine, marijuana, and alcohol in the past year (10F8). At consultative
 5 psychological examination in October of 2006, the claimant reported he had
 6 not used drugs in 2 years, but treatment notes from September of 2005 reflect
 7 report [sic] of smoking marijuana and cocaine (4F5; see also 2F15, 23, 42).
 8 At [the] hearing the claimant testified that he has been clean since September
 9 of 2009.

10 AR 29. Given that as noted by the ALJ above Dr. Eather's most recent opinion was provided in
 11 February 2009, it was not unreasonable for her to find the record fails to establish any definitive
 12 period of sobriety during the period in which Dr. Eather evaluated plaintiff. As such, it also was
 13 not unreasonable for the ALJ to find Dr. Eather reliance on plaintiff's self-reported sobriety
 14 called into question the credibility of his conclusions. Indeed, plaintiff has not challenged this
 15 stated basis for rejecting those conclusions.⁴

16 As for the evaluation of the opinion of Dr. Arnold that plaintiff also challenges, the ALJ
 17 found in relevant part:

18 . . . [State agency] consulting psychologist John Arnold[.] Ph.D.[.] examined
 19 the claimant in January of 2010. One exhibit seems to be missing pages, and
 20 one is a poor copy. However, interpretation of the claimant's performance on
 21 [psychological testing] appears to show that one of the claimant's . . . scores
 22 was extremely elevated, indicating that he may be over-reporting
 23 psychopathology and making his profile uninterpretable (34F7). Dr. Arnold
 24 opined mild to marked cognitive limitations and moderate to marked social
 25 limitations, apparently in the absence of substance use (See bottom of page at
 26 35F3; 34F5). However, his opinion is undermined by the evidence of a
 27 possible invalid profile on the [psychological testing]. His opinion also is not
 28 fully supported by his clinical findings, which showed the claimant to be
 29 appropriately dressed and cooperative, with full eye contact, unremarkable

30 ⁴ This failure to challenge the ALJ's properly stated reason for rejecting Dr. Eather's conclusions alone constitutes
 31 an appropriate basis for finding against plaintiff here. See Carmickle v. Commissioner of Social Sec. Admin., 533
 32 F.3d 1155, 1161 n.2 (9th Cir. 2008) (issue not argued with specificity in briefing will not be addressed); Paladin
 33 Associates., Inc. v. Montana Power Co., 328 F.3d 1145, 1164 (9th Cir. 2003) (by failing to make argument in
 34 opening brief, objection to district court's order was waived); Kim v. Kang, 154 F.3d 996, 1000 (9th Cir.1998)
 35 (matters not specifically and distinctly argued in opening brief ordinarily will not be considered). Plaintiff does
 36 challenge the ALJ's rejection of *Dr. Arnold's* conclusions on this basis (see ECF #15, p. 12), but as discussed below
 37 that is not a reason the ALJ actually gave for rejecting them.

1 psychomotor activity, and flexible judgment and problem-solving (34F, 35F).
 2 Finally, his opinion is inconsistent with the medical record as a whole, which
 3 shows relatively intact daily activities. The undersigned accordingly gives Dr.
 4 Arnold's opinion regarding the claimant's functional limitations little weight.

5 AR 33-34. For the same reasons discussed above in regard to Dr. Eather's conclusions, the
 6 Court agrees with plaintiff that the ALJ erred in rejecting Dr. Arnold's opinion on the basis that
 7 it was inconsistent with the medical record and plaintiff's daily activities. The Court also agrees
 8 that given that Dr. Arnold himself was aware of the invalid testing profile and yet still assessed
 9 the limitations that he did, the ALJ erred in rejecting Dr. Arnold's opinion on this basis as well.

10 See Gonzalez Perez v. Secretary of Health and Human Services, 812 F.2d 747, 749 (1st Cir.
 11 1987) (ALJ may not substitute own lay opinion for that of physician); see also McBrayer v.
 12 Secretary of Health and Human Services, 712 F.2d 795, 799 (2nd Cir. 1983) ; Gober v. Mathews,
 13 574 F.2d 772, 777 (3rd Cir. 1978).

14 Once again, though, the ALJ did provide a legitimate basis for rejecting the opinion of
 15 Dr. Arnold. That is, the ALJ noted the unremarkable mental status examination results included
 16 in the opinion. See Batson, 359 F.3d at 1195 (ALJ need not accept opinion of physician if it is
 17 inadequately supported by clinical findings). As with the ALJ's rejection of the conclusions of
 18 Dr. Eather on the basis of a lack of any clear period of sobriety, furthermore, plaintiff here too
 19 has not specifically challenged this basis for rejecting Dr. Arnold's opinion. See Carmickle, 533
 20 F.3d at 1161 n.2; Paladin Associates, 328 F.3d at 1164; Kim, 154 F.3d at 1000. Accordingly, the
 21 ALJ properly rejected that opinion as well.

22 Finally, with respect to the opinion of Dr. Gibson, the ALJ found in relevant part:

23 Consulting psychiatrist Scot Gibson[,] MD[,] examined the claimant in
 24 September of 2007, and gave the following functional assessment (12F):

25 The claimant had a fairly poor ability to concentrate throughout the
 26 interview. If pushed on certain cognitive tests, he became irritable and

refused to complete them. This speaks to his persistence. His pacing was somewhat uneven. The claimant probably has a limited ability to perform simple and repetitive tasks given his psychosis and severe depressive symptoms. He is quite impaired in his ability to perform detailed and complex tasks. His ability to withstand the stresses of a workplace and to accept instructions from supervisors is very limited.

Dr. Gibson based his opinion in part on the claimant's erroneous report that he had not abused substances for 3 years . . . , and thus did not discuss the effects of substance abuse. His opinion also is inconsistent with the medical record as a whole, which shows relatively intact daily activities. The undersigned gives his opinion little weight.

AR 32-33. Although plaintiff discusses Dr. Gibson's opinion in his opening brief, he does not actually assert a basis for finding fault with the ALJ's evaluation thereof, and thus he has waived this issue. See Carmickle, 533 F.3d at 1161 n.2; Paladin Associates, 328 F.3d at 1164; Kim, 154 F.3d at 1000. In addition, as with Dr. Eather's conclusions, the ALJ did not err in discounting the opinion of Dr. Gibson on the basis that it relied on plaintiff's "erroneous report" of sobriety. Accordingly, here too the ALJ did not err. Thus, because plaintiff has failed to show the ALJ erred overall in his evaluation of the medical opinion evidence in the record, he has not shown there is any basis for overturning the ALJ's adverse disability determination.

CONCLUSION

Based on the foregoing discussion, the Court hereby finds the ALJ properly concluded plaintiff was not disabled. Accordingly, defendant's decision to deny benefits is AFFIRMED.

DATED this 2nd day of August, 2013.



Karen L. Strombom
United States Magistrate Judge